Supreme Court, U.S.
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No. 89-1448 (5)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

VIRGINIA BANKSHARES, INC., *et al.*,
Petitioners,
v.
DORIS I. SANDBERG,
Respondent.

FIRST AMERICAN BANK OF VIRGINIA, INC., *et al.*,
Petitioners,
v.
PAUL H. WEINSTEIN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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OPPOSITION TO MOTIONS TO FILE BRIEFS AMICUS CURIAE

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OPPOSITION TO MOTIONS TO FILE BRIEFS AMICUS CURIAE

Respondents Doris I. Sandberg and Paul H. Weinstein, *et al.* (collectively, "respondents"),[1] respectfully request that this Court deny the motions of the American Corporate Counsel Association ("ACCA") and the American Bankers Association and the Association of Bank Holding Companies ("the Banking Associations") for leave to file briefs amicus curiae on the grounds that, as shown more

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[1] For the list of corporations required by Supreme Court Rule 29.1, see the Petition and the Brief in Opposition.

specifically below, the tendered briefs do not comply with this Court's Rule 37.1.

Rule 37.1 requires that an amicus brief in support of a petition for certiorari present relevant matter not presented by the parties. The would-be amicus briefs at issue here, however, merely repeat and elaborate partisan arguments of the petitioners. The brief tendered by the Banking Associations, for example, is premised entirely on slavish acceptance of the factual contentions asserted in the Petition.[2] Once it is recognized that those contentions were rejected by the jury, and that the Court of Appeals held that the evidence supported the verdict that the proxy statement contained material misstatements of fact, the Banking Associations' concern over the adverse consequences of a holding that "it is not enough to disclose material facts . . ." is revealed as no more than an imaginary hook on which to hang a repetition of petitioners' argument.[3]

Similarly, the Proposed Brief of the ACCA simply elaborates an argument already made at pages 11 and 15 of the Petition. Indeed, the content and style of the two proposed briefs (and even the form of the word processing of one of them) so clearly mimic petitioners' brief as to raise the question whether they were prepared by petitioners' counsel. Counsel of record signing the two amicus briefs, and counsel for petitioners, declined to answer that question. *See* Exhibits A, B and C hereto.

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[2] The Proposed Brief of the Banking Associations repeats the Petition's "subjective motivation" language, without considering that the proxy statement falsely stated that the directors had made a determination that they never made (*see* Brief in Opposition), or that the directors' decision to approve the merger to avoid being replaced was not a subjective one, but was articulated and decided at a meeting of the board. JA 851-52; 873-75; 745-46.

[3] Proposed Brief of the Banking Associations at 15.

Nor do the briefs—or tactics[4]—of these would-be friends of the Court manifest the fairness that ought to animate a brief amicus curiae. For example, the brief of the Banking Associations fails to disclose that banks have been subject to the "proxy requirements of the Securities Exchange Act" since its enactment, and that the 1964 legislation referred to in the brief merely transferred "the administration of [Section 14(a) and other] parts of the Act with respect to banks . . . from the SEC to the various federal banking authorities," *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 157 n.15 (1976).[5]

Denial of the instant motions would discourage ghost-written amicus briefs that do not comply with Rule 37's requirement that a brief amicus curiae provide relevant matter from a perspective larger than that of the parties.

CONCLUSION

For the foregoing reasons, the motions for leave to file briefs amicus curiae should be denied.

Respectfully submitted,

JOSEPH M. HASSETT *
JOHN C. KEENEY, JR.
GEORGE H. MERNICK, III
DAVID G. LEITCH
ALBERT W. TURNBULL
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Counsel for Respondents

* Counsel of Record

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[4] For example, although respondents informed ACCA in writing on April 6, 1990 that they had not consented to the filing of an amicus brief, ACCA's motion, mailed to respondents on April 7, 1990 (*see* Ex. D), states to the contrary.

[5] Thus, as has never been questioned by petitioners, *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), applies to banks as fully as to any other entity.

EXHIBITS

EXHIBIT A

HOGAN & HARTSON
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Washington, D.C. 20004-1109
(202) 637-5600

JOSEPH M. HASSETT
Direct Dial (202) 637-5643

April 9, 1990

VIA TELECOPIER

Nancy Nord, Esq.
Executive Director
American Corporate Counsel Association
1225 Connecticut Avenue, N.W.
Suite 302
Washington, D.C. 20036

Re: Virginia Bankshares, Inc., et al. v.
Doris I. Sandberg, et al., No. 89-1448

Dear Ms. Nord:

This will confirm our telephone conversation at approximately 1:45 PM today in which I inquired whether Mayer, Brown & Platt, counsel for the petitioner in the above matter, drafted the amicus curiae brief submitted over your name as counsel of record for the American Corporate Counsel Association. You refused to answer the question. You also refused to answer my question as to whether the brief bearing your signature was prepared using Mayer, Brown & Platt's word processing facilities.

Very truly yours,

/s/ Joseph M. Hassett
JOSEPH M. HASSETT

JMH/lsl

cc: Stephen M. Shapiro, Esq.

EXHIBIT B

HOGAN & HARTSON
COLUMBIA SQUARE
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Washington, D.C. 20004-1109
(202) 637-5600

JOSEPH M. HASSETT
Direct Dial (202) 637-5643

April 9, 1990

VIA TELECOPIER

Michael F. Crotty, Esq.
Deputy General Counsel for Litigation
American Bankers Association
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Virginia Bankshares, Inc., et al. v.
Doris I. Sandberg, et al., No. 89-1448

Dear Mr. Crotty:

This will confirm our telephone conversation at approximately 1:50 PM today in which you refused to answer my question as to whether the brief filed over your signature on behalf of the American Bankers Association and the Association of Bank Holding Companies was drafted by Mayer, Brown & Platt, counsel for the petitioner in the above matter.

Very truly yours,

/s/ Joseph M. Hassett
JOSEPH M. HASSETT

JMH/lsl

cc: Stephen M. Shapiro, Esq.

EXHIBIT C-1

HOGAN & HARTSON
COLUMBIA SQUARE
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

JOSEPH M. HASSETT
Direct Dial (202) 637-5643

April 9, 1990

VIA TELECOPIER

Stephen M. Shapiro, Esq.
Mayer, Brown & Platt
190 S. LaSalle Street
Chicago, Illinois 60603

Re: Virginia Bankshares, Inc., et al. v.
Doris I. Sandberg, et al., No. 89-1448

Dear Mr. Shapiro:

This will confirm our telephone conversation of approximately 1:55 PM today in which, in response to my question as to whether your firm drafted the amicus curiae briefs filed in the above matter by the American Corporate Counsel Association and, in a joint filing, by the American Bankers Association and the Association of Bank Holding Companies, you stated that you "consulted" with those entities, but declined to discuss the nature and extent of consultation with your "allies." You also declined to say whether either brief was prepared on your firm's word processing facilities.

Very truly yours,

/s/ Joseph M. Hassett
JOSEPH M. HASSETT

JMH/lsl

EXHIBIT C-2

MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, Illinois 60603-3441

April 10, 1990

Washington
London
New York
Houston
Los Angeles
Tokyo Liaison Office

Stephen M. Shapiro
(312) 701-7327

VIA FACSIMILE

Joseph M. Hassett, Esq.
Hogan & Hartson
Columbia Square
666 Thirteenth Street, N.W.
Washington, D.C. 20004-1109

Re: Virginia Bankshares, Inc., et al. v.
Doris I. Sandberg, et al., No. 89-1448

Dear Mr. Hassett:

I have received your letter of yesterday, which seriously misdescribes the conversation which I had with you regarding the amicus briefs filed in support of the certiorari petition in the above-captioned case. I declined to discuss this subject as a matter of professional principle, and no inference can be drawn from my refusal to discuss your improper question.

If you intend to submit your letter of yesterday to the Supreme Court, I trust that you will also submit a copy of this letter to avoid seriously misleading the Court.

Very truly yours,

/s/ Stephen M. Shapiro
STEPHEN M. SHAPIRO

SCS:eam

cc: Michael F. Crotty, Esq.
Nancy A. Nord, Esq.

EXHIBIT C-3

HOGAN & HARTSON
COLUMBIA SQUARE
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
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JOSEPH M. HASSETT
Direct Dial (202) 637-5643

April 10, 1990

VIA TELECOPIER

Stephen M. Shapiro, Esq.
Mayer, Brown & Platt
190 S. LaSalle Street
Chicago, Illinois 60603

Re: Virginia Bankshares, Inc., et al. v.
Doris I. Sandberg, et al., No. 89-1448

Dear Mr. Shapiro:

Your letter of today with respect to the above matter does not dispute my account of what you said to me yesterday but simply adds your hitherto unexpressed rationale for declining to discuss the nature and extent of your consultation with your allies. Nonetheless, I shall be glad to submit your letter to the Supreme Court as you requested.

Sincerely,

/s/ Joseph M. Hassett
JOSEPH M. HASSETT

JMH/lsl

EXHIBIT D

[Postage Meter Dated April 7, 1990]

AMERICAN CORPORATE COUNSEL ASSOCIATION
1225 Connecticut Avenue, N.W.
Suite 302
Washington, D.C. 20036

TO:

Joseph M Hassett
Hogan & Hartson
555 Thirteenth Street NW
Washington, DC 20004